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Henry Deeb Gabriel

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THE JOURNAL OF APPELLATE PRACTICE AND PROCESS

BOOK REVIEW

UNEQUALED EXPERTISE: CHILDRESS AND DAVIS'S *FEDERAL STANDARDS OF REVIEW**

Henry Deeb Gabriel**

As every experienced appellate lawyer knows, each appeal starts with the standard of review. The reason is simple: The scope of appellate review is limited by a specific standard of review based on the type of case and the issue being appealed. Whether she handled the trial or not, appellate counsel must master the record fully, for only after mastering the record can she determine which of its parts are critical to the appeal.

But what is counsel to do in the face of a voluminous record? As Professors Childress¹ and Davis² remind us, the key to what counsel must extract and organize from the record is determined by the standard of review, which “prescribes the degree of deference given by the reviewing court to the actions

* Steven Alan Childress & Martha S. Davis, *Federal Standards of Review* (4th ed., LexisNexis 2010).

** Professor of Law, Elon University; former director of the Loyola University Federal Appellate Advocacy Program; former Professor in Residence, United States Department of Justice, Civil Division Appellate Staff.

1. Conrad Meyer III Professor of Law, Tulane University.

2. Eugene Harrington Professor of Law, Thurgood Marshall School of Law, Texas Southern University.

or decisions under review.”³ Only by having this level of deference clearly in mind can counsel select those aspects of the record necessary to formulate the issues as they will be presented to the court. Without having articulated the standard of review prior to working through the record, counsel risks wasting much valuable time flummoxed by the volume of information instead of moving through the record quickly to amass the essential parts that support the case. Moreover, if counsel does not tailor her argument around the standard of review, she may miss altogether the specific question that the court must address to resolve the case.⁴ In sum, the appropriate standard of review is essential to appellate practice.

How does one begin to find the standard of review? It differs depending on whether the case on appeal is criminal, civil, or administrative. And among these three categories, the divisions multiply quickly. In civil cases, for example, there are different standards for jury trials and bench trials, findings of fact and conclusions of law, dismissal on the pleadings and the granting of summary judgment. Nor, within our federal appellate system, is there a unified standard among the different circuits.

Any lawyer familiar with this multitude of standards knows the frustration of trying to target the exact standard of review appropriate to a specific case and appreciates the need for a single, concise, and accurate text that fully explores this complex and murky area of the law. Since the first edition was published in 1986, *Federal Standards of Review* has met this need. Professors Childress and Davis, both former federal law clerks, have been working on this project for over thirty years, and they bring to the text unequalled expertise in this narrow but important aspect of federal practice.⁵

3. *Federal Standards of Review* vol. 1, §1.01, 1-2.

4. The federal appellate courts have an excellent system to remind counsel of the importance of the standard of review: The Federal Rules of Appellate Procedure require a clear articulation of the standard in the appellate brief. See Fed. R. App. P. 28(a)(9)(B), 28(b)(5) (requiring both appellant and appellee to include the standard of review in their opening briefs). Yet, as the authors point out, one study has indicated that the number one reason for the rejection of a brief by the clerk’s office is the failure to state the standard of review. Childress & Davis, *supra n. **, at §1.02, 1-9 (citing Luther T. Munford, *The Most Common Mistakes in the Form of Fifth Circuit Briefs*, 14 Fifth Cir. Rptr. 227 (1997)).

5. The treatise covers only federal law. There is no equivalent text for state appellate practice. For state appeals, counsel must still plumb the depths of case law in search of the standard of review.

The recently published fourth edition is both timely and necessary. The third edition was published in 1999,⁶ and this new edition comprehensively includes the new case law as well as the most current local rules of appellate practice. It is conveniently set out in three volumes, one for civil cases, a second for criminal cases, and a third for administrative cases.

For many of us, one of the most important aspects of any book of this type is whether it is arranged so that a busy practitioner can home in on the answer quickly, efficiently, and accurately. The new edition of *Federal Appellate Practice* easily meets this requirement. Each volume has a comprehensive table of contents in addition to a well-thought-out and detailed index. The case law is heavily footnoted and each footnote provides a quick cite to the relevant circuit's law. Each standard is fully explained and secondary sources are cited for those who want to go beyond the mere rule to understand its purpose and limitations.

In sum, the new treatise is comprehensive and very easy to use. It provides accurate answers to the often-complicated question of the standard of review—answers that the appellate lawyer can find quickly. It is an essential tool for any federal appellate practitioner. There are only a few texts that every appellate lawyer should have on her desk. *Federal Standards of Review* is one of them.



6. The first edition was published in 1986, and the second edition was published in 1992.

